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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. EDWIN PHILLIPS, Defendant and Appellant.	B286715 (Los Angeles County Super. Ct. No. BA455160)

APPEAL from a judgment of the Superior Court for Los Angeles County, Sam Ohta, Judge. Conditionally reversed and remanded with directions.

Jared G. Coleman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, William H. Shin and Nikhil Cooper, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Edwin Phillips appeals from a judgment following his conviction, based upon a plea agreement, of one count of indecent exposure with a prior (Pen. Code,[1] § 314, subd. (1)). He raises a single issue in his appeal: whether section 1001.36, which was enacted after his conviction and gives trial courts discretion to order pretrial diversion for defendants with mental health issues under certain circumstances, applies retroactively to cases in which judgment has been entered but is not yet final. He contends the statute does apply retroactively, and that the case should be remanded for the trial court to determine if he qualifies for diversion. The Attorney General contends that the appeal must be dismissed because defendant failed to obtain a certificate of probable cause, but that in any event, section 1001.36 does not apply retroactively. We conclude that defendant may raise the retroactivity issue despite the absence of a certificate of probable cause, and that section 1001.36 does apply retroactively. Accordingly, we conditionally reverse the judgment and remand the matter with directions as set forth below.

BACKGROUND

In the early morning hours of March 3, 2017, defendant was arrested after he was seen masturbating on a sidewalk along Sunset Boulevard in Los Angeles; he then grabbed a woman who was walking by. He was charged by information with one felony count of indecent exposure with a prior (§ 314, subd. (1)) (alleging four prior indecent

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1 Further undesignated statutory references are to the Penal Code.

exposure convictions), and a misdemeanor count of assault and battery (§ 242). The information also alleged that defendant had seven prior felony convictions (mostly related to indecent exposure or issues regarding registering as a sex offender) within the meaning of section 1203, subdivision (e)(4).

In the months after the information was filed, defendant repeatedly made (or tried to make) *Marsden*[2] motions, all on the same grounds, to have a different attorney appointed to represent him. When those were denied, he at times sought to represent himself, although he always then withdrew his request. At one point, his appointed counsel declared a doubt as to defendant's mental competence, and a psychiatrist was appointed to evaluate him. The psychiatrist found that although defendant "does not suffer from any mood or psychotic disorder," he did "qualif[y] for a DSM-V diagnosis of Exhibitionistic Disorder as well as a history of Polysubstance Use Disorder (Alcohol and Cocaine)." However, the psychiatrist opined that defendant understood the charges and proceedings against him and had the capacity to rationally cooperate with his attorney, and therefore was competent to stand trial.

After the trial court found defendant competent to stand trial, defendant entered into a plea agreement. On September 11, 2017, he pleaded nolo contendere to the indecent exposure count, and the assault and battery count was dismissed. He was sentenced to the upper term

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[2] *People v. Marsden* (1970) 2 Cal.3d 118.

of three years, with execution of the sentence suspended, and was placed on probation.

Two months after entering his plea (on November 6, 2017) defendant, in propria persona, filed a notice of appeal and request for a certificate of probable cause. On his notice of appeal, defendant checked both the box indicating that his appeal challenges the validity of the plea and the box indicating "[o]ther basis for th[e] appeal," although he failed to specify what that basis was. No certificate of probable cause was issued, and on December 12, 2017, we issued an order limiting the issues on appeal to those that do not require a certificate of probable cause.

DISCUSSION

A. *Certificate of Probable Cause*

The Attorney General argues that defendant's appeal should be dismissed because he is challenging the validity of his plea, which requires a certificate of probable cause. We disagree that a certificate is required here.

Section 1237.5 provides that "[n]o appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere," except where defendant has obtained from the trial court a certificate of probable cause. Despite this broad language, the Supreme Court has held there are some exceptions. The Court instructs that "'courts must look to the substance of the appeal: "the crucial issue is what the defendant is challenging, not the time or manner in which the challenge is made." [Citation.] Hence, the critical inquiry is whether a

challenge to the sentence is *in substance* a challenge to the validity of the plea, thus rendering the appeal subject to the requirements of section 1237.5. [Citation.]'" (*People v. Buttram* (2003) 30 Cal.4th 773, 781-782.)

Recently, a split has developed among the courts of appeal regarding whether a certificate of probable cause is required for defendants who entered into plea agreements but then filed an appeal to seek retroactive application of laws enacted after their plea agreements; in each case, the plea agreement involved a stipulated sentence, and the new laws, if applied retroactively would (or could) reduce that sentence. (See *People v. Galindo* (A154509, May 22, 2019) ___ Cal.App.5th ____ [2019WL2207123].) Some courts have found that such an appeal is not barred by section 1237.5 because, among other reasons, a plea made under a plea agreement must be deemed to incorporate the subsequently enacted legislation; therefore, the plea agreement itself gives the defendant the benefit of the newly-enacted law without calling into question the validity of the plea. (See, e.g., *People v. Stamps* (2019) 34 Cal.App.5th 117, 121; *People v. Baldivia* (2018) 28 Cal.App.5th 1071, 1077 (*Baldivia*); *People v. Hurlic* (2018) 25 Cal.App.5th 50, 57.) Other courts have rejected this approach, finding that such an appeal constitutes a challenge to the validity of the plea because the stipulated sentence was an integral part of the plea agreement, and therefore the appeal could not go forward without a certificate of probable cause. (See, e.g., *People v. Galindo*, *supra*, ___ Cal.App.5th ____, ____; *People v. Fox* (A153133, May 3, 2019) ___

Cal.App.5th ___, ____ [2019WL1967716]; *People v. Kelly* (2019) 32 Cal.App.5th 1013, 1016.)

This case differs from most of the cases cited above, because defendant here does not seek resentencing of a stipulated sentence but instead seeks retroactive application of a pretrial diversion statute. The only published case that has addressed circumstances similar to those in this case is *Baldavia*, *supra*, 28 Cal.App.5th 1071, in which the defendant sought retroactive application of both a sentencing statute and Proposition 57, which amended the law to require a fitness hearing in juvenile court for a juvenile accused of committing a crime before that juvenile may be tried as an adult. We find the reasoning of *Baldivia* to be most applicable to this case and persuasive.

In *Baldivia*, the defendant, a juvenile, entered into a plea agreement (with a stipulated sentence) in an adult criminal proceeding that had been initiated without a juvenile court fitness hearing. In accordance with the agreement, he pleaded no contest to several counts and enhancement allegations, including a firearm enhancement allegation under section 12022.53. (*Baldivia*, *supra*, 28 Cal.App.5th at p. 1074.) He filed a notice of appeal and did not obtain a certificate of probable cause. (*Ibid.*) While his appeal was pending, Proposition 57 was passed and the Legislature enacted Senate Bill No. 620 (2017-2018 Reg. Sess.), which amended section 12022.53 to grant trial courts discretion to strike firearm enhancements. (*Id.* at pp. 1075 [Proposition 57], 1076-1077 [Senate Bill No. 620].)

On appeal the defendant argued, among other things, that Proposition 57 should be applied retroactively to his case. The Attorney General conceded that Proposition 57 applied retroactively to defendant, and did not address the absence of a certificate of probable cause. (*Baldivia*, *supra*, 28 Cal.App.5th at p. 1076.) After asking for briefing, the Sixth District Court of Appeal addressed "whether the Proposition 57 and firearm enhancement contentions could be raised in defendant's appeal from the judgment in the absence of a certificate of probable cause in light of defendant's agreed-term plea agreement." (*Ibid.*) Relying upon the California Supreme Court's decisions in *Doe v. Harris* (2013) 57 Cal.4th 64 (*Doe*) and *Harris v. Superior Court* (2016) 1 Cal.5th 984 (*Harris*), the *Baldivia* court concluded that both issues could be raised.

The appellate court explained: "'[T]he general rule in California is that the plea agreement will be "'deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy. . . .'" [Citation.] That the parties enter into a plea agreement thus does not have the effect of insulating them from changes in the law that the Legislature has intended to apply to them.' [Quoting *Doe*, *supra*, 57 Cal.4th at p. 66] . . . '[T]he parties to a plea agreement—an agreement unquestionably infused with a substantial public interest and subject to the plenary control of the state—are deemed to know and understand that the state, again subject to the limitations imposed by the federal and state Constitutions, may enact laws that will affect the consequences attending the conviction entered

upon the plea.' [Quoting *Doe*, at p. 70.]" (*Baldivia*, *supra*, 28 Cal.App.5th at pp. 1077-1078.)

The court then observed that in *Harris,* the Supreme Court applied *Doe* to a plea agreement that had been entered into before the enactment of Proposition 47, which permitted courts to resentence prior felony convictions as misdemeanors. The *Baldivia* court explained that "[t]he issue before the California Supreme Court was whether application of Proposition 47 to Harris would permit the prosecution to withdraw from the plea agreement and reinstate the original charges. [Citing to *Harris*, *supra*, 1 Cal.5th at p. 989.] The court viewed the question as 'whether the electorate intended the change to apply to the parties to this plea agreement.' [Quoting *Harris*, at p. 991.] Because Proposition 47 explicitly applied to convictions obtained by plea, the court found that the electorate had intended for the change to apply to plea agreements. [Citing *Harris*, at p. 991.]" (*Baldivia*, *supra*, 28 Cal.App.5th at p. 1078.)

The *Baldivia* court concluded that, "[u]nder *Doe* and *Harris*, a plea agreement is deemed to incorporate subsequent changes in the law so long as those changes were intended by the Legislature or the electorate to apply to such a plea agreement." (*Baldivia*, *supra*, 28 Cal.App.5th at p. 1078.) Although the court noted that "[i]n *Doe* and *Harris*, the changes in the law were expressly intended to apply retroactively" (*Baldivia*, *supra*, 28 Cal.App.5th at p. 1078) it observed that the Supreme Court found in *People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299 (*Lara*) that Proposition 57 implicitly incorporated an

"inference of retroactivity" into the newly-enacted law (*Baldivia*, *supra*, 28 Cal.App.5th at p. 1079). Thus, the court concluded: "If the electorate or the Legislature expressly or implicitly contemplated that a change in the law related to the consequences of criminal offenses would apply retroactively to all nonfinal cases, those changes logically must apply to preexisting plea agreements, since most criminal cases are resolved by plea agreements. It follows that defendant's appellate contentions were not an attack on the validity of his plea and did not require a certificate of probable cause." (*Ibid.*)

As discussed in section B., *post*, although the Supreme Court has not yet decided whether the Legislature implicitly intended that the newly-enacted section 1001.36 would apply retroactively to all nonfinal cases, we agree with the majority of appellate courts that have found the Legislature did so intend. Therefore, we conclude that defendant's contention that section 1001.36 retroactively applies to him is not an attack on the validity of his plea, and no certificate of probable cause is required.

B. *Retroactivity of Section 1001.36*

We turn now to the primary issue in this appeal, i.e., whether section 1001.36 applies retroactively. That statute, which became effective in June 2018, provides that a court may grant pretrial diversion to a defendant who suffers from certain mental disorders if the court is satisfied that specified criteria are met. (§ 1001.36, subd. (b).) The statute defines "pretrial diversion" as "the postponement of prosecution, either temporarily or permanently, at any point in the

judicial process from the point at which the accused is charged until adjudication, to allow the defendant to undergo mental health treatment." (§ 1001.36, subd. (c).) If defendant completes and performs satisfactorily in diversion, the court must dismiss the charges that were the subject of the criminal proceedings at the time of the initial diversion, and the arrest upon which the diversion was based is deemed never to have occurred. (§ 1001.36, subd. (e).) If, on the other hand, the court determines that the defendant is not performing satisfactorily in diversion or fails to complete it, the court may reinstate the criminal proceedings. (§ 1001.36, subd. (d).)

The first court to address in a published opinion whether section 1001.36 applied retroactively to defendants whose cases were not yet final when the statute took effect was the Fourth District Court of Appeal, Division Three, in *People v. Frahs* (2018) 27 Cal.App.5th 784 (*Frahs*), review granted Dec. 27, 2018, S252220, depublication requests denied. In that case, the defendant had been found guilty of two felony counts of robbery and a lesser included misdemeanor offense before section 1001.36 took effect. (*Id.* at p. 788.) One of the issues he raised on appeal was whether section 1001.36 applied retroactively. (*Ibid.*)

Addressing this issue, the *Frahs* court observed that in *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), the Supreme Court reasoned "that when a statute reduces or ameliorates the punishment [for certain criminal conduct], it is presumed that the Legislature has determined the offense no longer merits the greater punishment, and this rationale applies even if the defendant was convicted and sentenced before the

statute became effective." (*Frahs*, *supra*, 27 Cal.App.5th at p. 790, citing *Estrada*, *supra*, 63 Cal.2d at pp. 744-745.) The *Frahs* court then noted that the Supreme Court subsequently held in *Lara*, *supra*, 4 Cal.5th 299, "that while Proposition 57 [which required that a fitness hearing be held in the juvenile court before a juvenile could be prosecuted as an adult] did not mitigate punishment for any particular crime as in *Estrada* . . . , [it] did confer potential benefits to juveniles accused of crimes and constitutes an "'ameliorative change[] to the criminal law" that . . . the legislative body intended to "extend as broadly as possible."' [Citing *Lara*, *supra*, 4 Cal.5th at pp. 303-304, 308-309.]" (*Frahs*, *supra*, 27 Cal.App.5th at p. 790.)

Addressing the case before it, the *Frahs* court noted that "similar to Proposition 57, the mental health diversion program under section 1001.36 does not lessen the punishment for a particular crime. However, for a defendant with a diagnosed mental disorder, it is unquestionably an 'ameliorating benefit' to have the opportunity for diversion—and ultimately a possible dismissal—under section 1001.36. Further, it appears that the Legislature intended the mental health diversion program to apply as broadly as possible: 'The purpose of this chapter is to promote . . . [¶] (a) *Increased diversion* of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while protecting public safety.' (§ 1001.36, subd. (a), italics added.) [¶] Applying the reasoning of the Supreme Court, we infer that the Legislature 'must have intended' that the potential 'ameliorating benefits' of mental health diversion to 'apply

to every case to which it constitutionally could apply.'" (*Frahs*, *supra*, 27 Cal.App.5th at p. 791.)

Every appellate court decision, published or unpublished, that has considered the retroactivity of section 1001.36, except for two decisions (one published, one not published) from the Fifth District Court of Appeal, has agreed with the analysis of the *Frahs* court. In the Fifth District's recently-published opinion, *People v. Craine* (F074622, May 23, 2019) ___ Cal.App.5th ___ [2019WL2224863] (*Craine*), the court disagrees with the *Frahs* court's analysis because it concludes that "the text of section 1001.36 and its legislative history contraindicate a retroactive intent with regard to defendants . . . who have already been found guilty of the crimes for which they were charged." (*Craine*, *supra*, ___ Cal.App.5th at p. ____.) Because the Supreme Court has granted review of *Frahs* to decide whether section 1001.36 applies retroactively, we need not address *Craine* in detail. Suffice it to say that we are unconvinced by the court's analysis, and agree with the *Frahs* court that the Legislature implicitly intended for section 1001.36 to apply retroactively to all defendants whose judgments are not yet final.

C. *Application in the Present Case*

The Attorney General contends that even if section 1001.36 applies retroactively, defendant does not qualify for mental health diversion because defendant has not shown that he satisfies all the statutory criteria. The Attorney General acknowledges that although the psychiatrist who evaluated defendant to determine if he was

competent to stand trial found that he qualified for a diagnosis of Exhibitionistic Disorder (which would satisfy the first criterion under section 1001.36, subd. (b)(1)(A)), the psychiatrist did not determine that defendant's mental disorder significantly contributed to his conduct in the charged offenses (which included assault and battery) (§ 1001.36, subd. (b)(1)(B)), or that defendant's symptoms of the mental disorder would respond to mental health treatment (§ 1001.36, subd. (b)(1)(C)). In fact, the Attorney General observes that the psychiatrist opined that "[e]ven with sex offender treatment, exhibitionism is a very difficult paraphilia to control."

There is no question that defendant has not established that he can satisfy all of the statutory criteria, because no mental health diversion eligibility hearing has yet been held. But defendant has established a strong basis for holding such a hearing—as the Attorney General acknowledges, he has been diagnosed with a mental health disorder, Exhibitionistic Disorder, that appears to be directly related to the primary offense for which he was charged, i.e., indecent exposure. He must be allowed an opportunity to present evidence at an eligibility hearing to try to show that he meets the remaining statutory criteria. If he is able to do so, the trial court may then exercise its discretion in determining whether to place defendant in diversion.

DISPOSITION

The judgment is reversed conditionally, and the case is remanded with the following directions: on remand, the trial court shall conduct a mental health diversion eligibility hearing under section 1001.36. If the court finds that the statutory criteria are met, it may grant diversion, and if the defendant successfully completes diversion, the court shall dismiss the charges. However, if the court determines that the defendant does not meet the statutory criteria or if he does not successfully complete diversion, the judgment shall be reinstated.

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WILLHITE, J.

We concur:

MANELLA, P. J.

COLLINS, J.